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IN THE

Supreme Court of the United States

AMERICAN INSURANCE ASSOCIATION, AMERICAN RE-INSURANCE COMPANY, *et al.*,

Petitioners,

v.

JOHN GARAMENDI, COMMISSIONER OF INSURANCE FOR THE STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF FOR THE FEDERAL REPUBLIC OF GERMANY AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The Federal Republic of Germany respectfully submits this brief as amicus curiae in support of petitioners and urges the Court to reverse the decisions of the United States Court of Appeals for the Ninth Circuit in *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739 (2001), and *Gerling Global Reinsurance Corp. of America v. Low*, 296 F.3d 832 (2002).[1]

[1] Petitioners and respondent have consented to the filing of this brief; their letters of consent are on file with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the Federal Republic of Germany, made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICUS CURIAE

The Federal Republic of Germany has a very strong interest in this case, as reflected by its prior participation as an amicus curiae, because the California regulatory statute at issue, the Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"),[2] has a manifestly adverse impact on the Federal Republic's sovereign interests and on its foreign relations with the United States of America. In addition, the HVIRA, if enforced, would require German companies who themselves do no business in California to violate German privacy laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

The State of California's HVIRA affronts the sovereignty of the Federal Republic. The Federal Republic's sovereign interests are neither marginal nor academic—the question of restitution and compensation for victims of the National Socialist era and World War II is of the utmost importance to Germany, as a matter of both domestic and foreign policy.

Over the last 55 years, Germany has structured and provided over $100 billion in today's value in restitution and compensation to victims of National Socialism. These efforts culminated in the year 2000, when the Federal Republic of Germany, the United States of America, and others entered into two historic agreements—together, known as the "Berlin Agreements"[3]—for the purpose of

[2] Cal. Ins. Code §§ 13800-13807 (SER 516-524). "ER" refers to the Excerpts of Record in the preliminary injunction appeal, and "SER" refers to the Supplemental Excerpts of Record in the permanent injunction appeal.

[3] Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Executive Agreement") (ER 818-37); Joint Statement on Occasion of the Final Plenary Meeting Concluding International Talks on the Preparation of the Foundation, "Remembrance, Responsibility and the Future," July 17, 2000 ("Joint Statement") (ER 812-16).

providing additional compensation to certain surviving Holocaust victims and their heirs, and achieving legal closure for German companies. Under these agreements, the Federal Republic and thousands of German companies committed to endow a new German foundation with DM 10 billion (approximately $5 billion) to provide payments to more than 1.5 million aging victims of slave and forced labor and other Nazi-era wrongs, including those who hold any insurance policies that remain unpaid notwithstanding the extensive preceding post-war restitution and compensation programs. By international accord, the foundation is to be the exclusive remedy and forum for all asserted claims, including insurance-related claims.[4]

The HVIRA directly interferes with international agreements and German domestic legislation that together form the legal basis of Germany's post-war restitution and compensation programs. Not content with U.S. foreign policy, international agreements, and processes established by sovereign nations, the State of California enacted the HVIRA and several related statutes in 1999, as part of its own "foreign policy" for the resolution of Holocaust-era claims. California's statutory scheme—which is inconsistent with German and U.S. foreign policy—has the practical effect of regulating the insurance industry in Germany (and elsewhere in Europe) and empowering California courts to serve as a forum for contentious litigation against German and other foreign companies. The HVIRA in particular threatens to revoke the license of any California insurance companies whose German (or other European) affiliates fail to disclose in a public registry the personal data from every insurance policy issued in Europe between 1920 and 1945. By leveraging asserted regulatory power over local insurers through the HVIRA, the State of California seeks to compel

[4] *See* Executive Agreement, art. 1(1), 1(4) (ER 821-22).

German companies to engage in conduct that would violate German and European laws.

The HVIRA impinges on Germany's sovereign authority to regulate its own insurance industry and to create exclusive post-war restitution and compensation programs in cooperation with other nations. Moreover, it frustrates the spirit and purpose of the U.S.-German Executive Agreement and creates tension in diplomatic relations between the United States and Germany.

The Ninth Circuit's decisions upholding the HVIRA conflict with decisions of other Circuits[5] and violate well-established legal principles: (a) by holding, in the first decision, that the HVIRA did not violate limits imposed on state power by the reservation to the federal government of the Foreign Affairs power and by the dormant Foreign Commerce Clause of the U.S. Constitution; and (b) by holding, in the second decision, that the HVIRA did not exceed limits imposed on state power by the Due Process Clause of the U.S. Constitution to legislate with respect to matters outside its boundaries. Reversal of these decisions is necessary to enjoin the State of California's intrusion on German sovereignty and its impermissible interference with the U.S.-German Executive Agreement and the Federal Republic's ability to engage in diplomatic relations with the United States as a unitary political entity.

BACKGROUND

I. GERMANY'S POST-WAR COMPENSATION AND RESTITUTION PROGRAMS

For over fifty years, Germany has acknowledged its moral and historical responsibility to compensate the victims of National Socialist persecution and oppression. In 1951, two years after the founding of the Federal Republic in 1949,

[5] *See, e.g., Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

Chancellor Konrad Adenauer expressed this sense of duty when he stated that "[i]n our name unspeakable crimes have been committed and they demand restitution, both moral and material . . . ."[6] Since that time, the Federal Republic has sought to address these heinous wrongs, with full awareness that no amount of money will ever be enough to atone for them. To date, the Federal Republic has paid roughly $100 billion in compensation and continues to pay approximately $600 million each year to roughly 100,000 pensioners who suffered such injuries.[7] As part of these programs, Germany returned all real estate and other assets capable of being restored to their rightful owners; paid over two million claims for assets that could not be returned, including virtually all insurance policies; and reached global settlements with Jewish survivor organizations with respect to those victims who died without heirs or did not file restitution claims.

The United Nations has commented that the Federal Republic's restitution and compensation programs are "[t]he most comprehensive and systematic precedent of reparation by a Government to groups of victims for the redress of wrongs suffered . . . ."[8]

II. THE CALIFORNIA HVIRA

The HVIRA compels each insurer "currently doing business in" the State of California to disclose detailed information concerning any insurance policies that it sold "directly or through a related company, to persons in Europe,

[6] *See* FRG Background Papers: German Compensation for National Socialist Crimes, *available at* http://www.germany-info.org/relaunch/info/archives/background/ns_crimes.html at 2 (last visited Feb. 3, 2003).

[7] *Id.* at 1.

[8] *Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Provisional Agenda Item 4, at 55, ¶ 107, U.N. Doc. E/CN.4/Sub. 2/1993/8.

which were in effect between 1920 and 1945, whether the sale occurred before or after the insurer and the related company became related . . . ." Cal. Ins. Code § 13804(a). The information that must be disclosed includes the number of insurance policies, "[t]he holder, beneficiary, and current status of those policies," and "[t]he city of origin, domicile, or address for each policyholder listed in the policies." *Id.* § 13804(a)(1)-(3). The HVIRA also requires each of these insurance companies to certify whether and how the proceeds of the policies have been paid to beneficiaries and their heirs, distributed to qualified charities, or otherwise distributed in accordance with a court order. *Id.* § 13804(b)(1)-(4).

The HVIRA in turn requires the California Commissioner of Insurance to make this information publicly available by establishing and maintaining a public Holocaust Era Insurance Registry "containing records and information relating to insurance policies . . . of Holocaust victims, living and deceased." *Id.* § 13803.

The HVIRA is part of a statutory framework that purports to empower the State of California's regulators and courts to govern the process of resolving Holocaust-related claims against European insurers. A related statute authorizes the California Commissioner of Insurance to suspend the license of an insurer for failing to pay Holocaust-related claims, regardless of the victim's connection to California, and sets forth California's own statutory definitions of Holocaust victims and claims. Cal. Ins. Code § 790.15(a) and (b)(1). Another related statute establishes a cause of action for "any Holocaust victim, or heir or beneficiary of a Holocaust victim, who resides in this state and has a claim arising out of an insurance policy or policies purchased or in effect in Europe before 1945." Cal. Civ. P. Code § 354.5(b). The statute grants California state courts venue and jurisdiction to try cases under California law, and abolishes applicable statute-of-limitations defenses if a claim is brought before December 31, 2010. *Id.* § 354.5(b) & (c).

The California Legislature's express purpose for enacting the HVIRA was to resolve questions concerning insurance policies held by Holocaust victims and survivors and to "protect the claims and interests of California residents, as well as to encourage the development of a resolution to these issues through the international process or through direct action by the State of California . . . ." Cal. Ins. Code § 13801(d)-(f).

III. GERMAN-U.S. EXECUTIVE AGREEMENT ON THE FOUNDATION

At the same time the California Legislature was seeking to impose its own views of how best to resolve these issues by enacting the HVIRA and related statutes, the Federal Republic and the United States, along with numerous other parties, were deeply engaged in diplomatic negotiations on an international agreement intended to provide a global resolution of any remaining Nazi-era claims, including unpaid insurance policies. The international efforts met with success in the form of a landmark agreement between the Federal Republic and the United States.

On July 17, 2000, the Federal Republic and the United States entered into the U.S.-German Executive Agreement. This agreement resulted from nearly two years of negotiations under the leadership of Chancellor Schröder and President Clinton. The agreement recalls "that for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II though political and governmental acts between the United States and the Federal Republic of Germany" and notes "that this Agreement and the establishment of the Foundation represent a fulfillment of these efforts." Executive Agreement, preamble (ER 821).

The Executive Agreement called for the Federal Republic to establish a German Foundation, "Remembrance, Responsibility and the Future" ("Foundation"), pursuant to German law, to be endowed with DM 5 billion from the

Federal Republic and another DM 5 billion from German companies, for the purpose of providing a concluding measure of relief to Nazi-era victims, including pertinently those who had uncompensated insurance claims. *See* Executive Agreement (ER 818-37).

The two countries made clear in their agreement that it is in their foreign policy interests for the Foundation "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." *Id.*, art. 1(1) (ER 821). Relatedly, the agreement recognizes that "both parties desire all-embracing and enduring legal peace" for German companies with respect to the Nazi era "to advance their foreign policy interests." *Id.*, preamble (ER 820). To that end, the agreement obligates the United States to take steps in courts and with state and local governments in the United States to foster all-embracing and enduring legal peace for German companies. *Id.*, arts. 2(1) and 2(2) (ER 822-23; 832-35).[9]

Specifically with respect to insurance claims, Article 1(4) of the agreement provides that any remaining unpaid insurance policies that come within the claims handling procedures adopted by the International Commission on Holocaust Era Insurance Claims (ICHEIC) as of July 2000 will be processed by German companies "on the basis of such procedures and on the basis of additional claims

[9] The bilateral U.S.-German Executive Agreement was accompanied by a Joint Statement signed by the Federal Republic, the United States, Israel, five Central and Eastern European nations, the Conference on Jewish Material Claims against Germany, and other interested parties. The Joint Statement reflects an international consensus that it is in all the parties' interests for the Foundation to be the exclusive remedy and forum for the resolution of all National Socialist era and World War II claims against German companies, including insurance claims, and that German companies should receive all-embracing and enduring legal peace. *See* Joint Statement, preamble, ¶¶ 4(b) & (c) (ER 812-16).

handling procedures that may be agreed among the Foundation, ICHEIC, and the German Insurance Association." *Id.*, art. 1(4) (ER 822).

On October 16, 2002, the Foundation, ICHEIC, and the German Insurance Association (GDV) signed an agreement regarding such claims handling procedures and the publication of pertinent insurance records, in a manner that satisfies the requirements of European data protection laws. *See* Agreement Concerning Holocaust Era Insurance Claims (Lodg. L70-L89). State Department spokesman Richard Boucher explained:

> The United States continues to support the work of the Foundation, including through the fulfillment of its obligations under the July 2000 U.S.-German Executive Agreement. This insurance agreement is the result of ongoing international efforts to address the injustices of World War II and the National Socialist era. The United States continues to support efforts to resolve matters of Holocaust restitution and compensation through cooperative means outside of litigation.[10]

An advisory group and expert group established pursuant to the October 16, 2002 agreement have nearly completed preparation of a list of holders of insurance policies issued by German companies who may have been Holocaust victims. The list is expected to be published by ICHEIC in April 2003.

IV. GERMANY'S FOUNDATION LAW

On August 2, 2000, the German Parliament (Bundestag) established the Foundation as an instrumentality of the Federal Republic, pursuant to the "Law on the Creation of a Foundation 'Remembrance, Responsibility and Future'"

[10] U.S. Department of State, Press Statement, *Holocaust Insurance Agreement Signed* (Oct. 17, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/14455.htm.

(Gesetz zur Errichtung einer Stiftung "Errinnerung, Verantwortung und Zukunft" or "Foundation Law").[11] The Foundation Law incorporates and implements German obligations under the Executive Agreement and sets forth guidelines for the administration of the Foundation. Pursuant to the law, the Foundation was endowed with roughly $5 billion, half contributed by the Federal Republic and half on a voluntary basis by thousands of German companies. The Foundation has already provided payments to over a million aging victims of National Socialist oppression and persecution.

Consistent with German and U.S. foreign policy, the Foundation Law establishes the Foundation as the exclusive forum for all Nazi-era claims against German companies and excludes further claims. Foundation Law, § 16(1). The Federal Republic maintains legal supervision over the Foundation. *See* Foundation Law, § 8(1); *see also* Executive Agreement, art. 1(3) (ER 822).

On August 17, 2000, one month after the Executive Agreement was signed, the U.S. Department of State issued an official statement in recognition of the Federal Republic's passage of the Foundation Law:

> The United States welcomes German Acting President Biedenkopf's signature on August 12 of a law establishing the foundation "Remembrance, Responsibility and Future." . . . The United States believes that the foundation should be the exclusive remedy for the resolution of all asserted claims against German companies arising from the Nazi era. Claims covered by the law include slave and forced labor, aryanization, medical experimentation and other cases of personal injury and damage to or

[11] *See* German Federal Law on the Creation of a Foundation "Remembrance, Responsibility and the Future," Bundesgesetzblatt: BGBl. 2000 I 1263, *available at* http://www.stiftung-evz.de/fremdsp/englisch/ st_ges_en.html ("Foundation Law").

> loss of property including banking assets *and insurance policies.*[12]

ARGUMENT

I. THE HVIRA HAS EXTRATERRITORIAL EFFECTS THAT EXTEND TO GERMANY.

The HVIRA impermissibly imposes California's regulatory power on foreign insurance companies located in Germany and elsewhere in Europe. The HVIRA requires insurers doing business in California publicly to disclose private personal information regarding all insurance policies that these insurers or any of their "related" companies issued in Europe between 1920 and 1945. The statute extends to all related European companies, even those that have never done business in California and those with relationships to California licensees that began long after 1945. HVIRA §§ 13804, 13806 (SER 520-21, 523). It covers all policies from the relevant 25-year period, not merely those of known Holocaust victims. The effect is to compel insurance companies to place in a public register personal and confidential information relating not only to policies held by victims of the Holocaust, but also to millions of policies held by individuals who were not victims. Current estimates suggest that less than 1 percent of all insurance policies issued by German companies during the period 1920 to 1945 were issued to Holocaust victims, and in any regard most of those policies issued to Holocaust victims have already been compensated pursuant to prior German compensation and restitution measures.

Related California legislation purports to create a California cause of action to recover on Holocaust-era insurance claims, establishes venue and jurisdiction in

[12] Statement by Philip T. Reeker, Deputy Spokesman, *German Foundation for Holocaust Era Claims Established* (U.S. Dep't of State, Office of the Spokesman, Aug. 17, 2000), *available at* http://www.usembassy.de/policy/holocaust/welcomelaw.htm (emphasis added).

California state courts, and purports to waive applicable statutes of limitation.

By granting the California Commissioner of Insurance the power to revoke the license of in-state insurers that fail to disclose private information in the hands of their European affiliates, the HVIRA attempts to coerce German insurers in Germany to act in certain ways that are inconsistent with German law and German sovereign interests.

A. The HVIRA Infringes Germany's Sovereign Authority To Regulate The Insurance Industry In Germany.

The Federal Republic has the exclusive and sovereign authority to prescribe laws applicable to German insurance companies operating in Germany. The Federal Republic has enacted an extensive statutory framework, which includes the Insurance Supervision Law (Versicherungsaufsichtsgesetz or "VAG"), to regulate German insurers. The VAG designates the Federal Financial Services Supervisory Office (Bundesanstalt für Finanzdienstleistungsaufsicht or "BAFIN," formerly known as Bundesaufsichtsamt für das Versicherungswesen (BAV)), as the competent supervisory body of the federal government for the regulation of insurance in Germany and grants the BAFIN significant powers to regulate the German insurance market. §§ 81-103 VAG.

The Federal Republic has, in addition, enacted and is responsible for enforcing extensive privacy laws such as the Federal Data Protection Law (Bundesdatenschutzgesetz or "BDSG"), which applies to German insurance companies in Germany. The Federal Republic, like many other European countries, has "data protection" laws that typically are more stringent than in the United States and reflect a strong public policy against the dissemination of private information in corporate or government hands. In particular, the BDSG prohibits the disclosure of personal data, including the

disclosure of information regarding insurance policy records without the express authorization of policyholders or their beneficiaries. § 28(2) Nr. 1b BDSG.

The HVIRA contravenes German law. By threatening to suspend the licenses of California insurance companies unless "related" insurance companies in Germany agree to the publication in California of detailed information concerning German and other European policies, the HVIRA seeks to supplant the Federal Republic's regulation of insurance companies in Germany, directly implying that the Federal Republic cannot be trusted to perform its sovereign duties. Furthermore, the HVIRA requires California affiliates to disclose information held by "related" German insurance companies notwithstanding applicable German privacy laws governing disclosure of the required information. *See id.* As the Federal Republic advised the Ninth Circuit[13] (although the Ninth Circuit appears to have ignored this information), the relevant German regulatory agencies have concluded that compliance by German companies with the HVIRA would cause them to violate German law and thereby subject them to civil and criminal penalties.[14] As the Federal Republic informed the Ninth Circuit, these are correct conclusions under German law.[15]

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[13] Brief Amicus Curiae Supporting Affirmance of Summary Judgment for Plaintiffs-Appellees/Cross-Appellants 15-17 (filed Mar. 18, 2002) ("March 18, 2002 FRG Brief").

[14] The District Government of Cologne, Germany, concluded on May 16, 2000, that under the BDSG "the transmission of data in the form of lists pertaining to all policyholders from 1920-1945 . . . *is not permissible*." (ER 1182 (emphasis added).)

[15] March 18, 2002 FRG Brief 17.

B. The HVIRA Creates Conflicting Legal Duties For German Insurance Companies Doing No Business In California.

The HVIRA's conflict with German law has the practical effect of forcing German insurance companies, who understandably are not indifferent to the fate of their California affiliates, to choose between compliance with California law on the one hand and compliance with German laws on the other. If German companies provide the requested information, they do so in violation of German law and, therefore, subject themselves to criminal and civil penalties in Germany. If German insurance companies decline to comply with the HVIRA's publication requirements, the California insurance companies to which they now are affiliated (some 55 to 80 years after the issuance of the policies) will lose their licenses to do business in California, without a meaningful hearing.

By threatening to suspend the licenses of California insurers based on the conduct of "related" insurers in Germany, the HVIRA has the practical effect of extraterritorially affecting conduct of German companies not doing business in California. Indeed, the HVIRA's primary function is to extend California's regulatory power to cover insurance companies that have no nexus with the State of California: German (and other European) insurance companies that issued policies in Europe between 1920 and 1945, have never done business in California, and are under the regulatory jurisdiction of Germany (and other European sovereign nations). Absent any effect in Germany and elsewhere in Europe, the HVIRA would serve no useful purpose in California's campaign to establish itself as a litigation haven for Holocaust-related claims.

C. The HVIRA Has The Practical Effect Of Controlling Conduct Outside California.

The HVIRA directly affects insurance companies located in Germany by compelling them to search their records and produce the private information that California seeks to make public. Using regulatory and economic coercion, the State of California effectively induces German companies doing business in Germany to disclose information that is otherwise protected against disclosure by German law. The HVIRA's net effect, and in fact its very purpose, is to enable California regulators to reach into German jurisdiction to obtain information that: (1) relates to transactions that occurred in Germany between German parties; (2) is subject to German law; and (3) is in the custody of German insurers incorporated in Germany.

The Ninth Circuit erred in asserting that the HVIRA has no "direct effect" in Germany merely because the State of California does not directly impose sanctions on German companies for noncompliance. 296 F.3d at 842. The threat of license revocation for noncompliance has the practical effect of penalizing German companies for noncompliance. The Ninth Circuit's remark that "foreign insurers would bear no burden resulting from their affiliates' compliance with HVIRA," 296 F.3d at 840, is stunningly formalistic. And it ignores the Federal Republic's amicus submission that the unlawful disclosure of private insurance data would subject German companies to civil and criminal penalties in Germany.

The Ninth Circuit further discounted the HVIRA's extraterritorial effects in Germany by implying that they are merely incidental. 240 F.3d at 746-47. This assessment mischaracterizes the HVIRA. The HVIRA is not a law of general applicability that happens to have incidental effects on German companies in Germany. There is nothing "incidental" about the HVIRA's extraterritorial impact in Germany, which the California Legislature sought to

produce.[16] To the contrary, the law is expressly directed at companies that issued insurance policies in Europe from 1920 to 1945. The vast majority of these companies are located in Europe, and many are in Germany.

It is precisely this type of extraterritorial regulation that the Federal Republic and the United States sought to pretermit when, in July 2000 (not long after the HVIRA was passed), they culminated 55 years of diplomatic practice by entering into the U.S.-German Executive Agreement.

II. THE HVIRA INTERFERES WITH THE U.S.-GERMAN EXECUTIVE AGREEMENT AND THE GERMAN FOUNDATION LAW.

The historic U.S.-German Executive Agreement resulted from nearly two years of negotiations. As noted, it recalls "that for the last 55 years the parties have sought to work to address the consequences of the National Socialist era and World War II though political and governmental acts between the United States and the Federal Republic of Germany" and notes "that this Agreement and the establishment of the Foundation represent a fulfillment of these efforts." *Id.*, preamble (ER 821). It states that the claims process established under the Foundation is "to be the exclusive remedy and forum for the resolution of all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II." *Id.*, art. 1(1) (ER 821). The countries also expressed their intent for the U.S.-German Agreement to achieve "all-embracing and enduring legal peace for German companies with respect to the National Socialist era and World War II." *Id.*, preamble, art. 3(1) (ER 824). The Foundation Law similarly provides that the Foundation is the exclusive forum. *See* Foundation Law, § 16(1).

The HVIRA is directly and self-consciously at odds with the Executive Agreement and Foundation Law. The HVIRA

[16] *See, e.g.*, Cal. Ins. Code § 13801(d)-(f).

is part of a legislative effort to create an alternative, litigation-based California-centric scheme to address the same set of Holocaust-related issues, i.e., outstanding claims against Germany and German companies, that were addressed and resolved by the Executive Agreement and Foundation Law.

The HVIRA threatens a fundamental premise of the Executive Agreement and Foundation Law: that the Foundation is the exclusive forum for addressing claims asserted against German companies, including claims on any remaining unpaid insurance policies. The HVIRA, which is part of a statutory scheme to facilitate the litigation of Holocaust-era claims in California state courts, also undermines the two countries' clear intent to achieve "all-embracing and enduring legal peace" for German companies.

By imposing California law on the process of post-war restitution and compensation—in direct conflict with an international agreement entered into by the United States and a German law enacted in accordance with that agreement—the HVIRA impermissibly intrudes on the province of nations. California's purported regulation of foreign conduct with respect to Holocaust-era claims has a destabilizing effect on the careful and precarious balance that has been achieved by the Berlin Agreements. That balance is best described in a letter dated June 16, 2000, from the White House to the Federal Republic. It states:

> We are now on the verge of an historic accomplishment .... We have agreed upon a DM 10 billion capped fund for the resolution of slave and forced labor claims and for all other wrongs committed by German companies arising out of the Nazi-era. ... Let us reiterate ... that the President and the Administration are committed ... to enduring and all-embracing legal peace for German companies, for present and future cases, for consensual and non-consensual cases. ... We have

> worked together with you to develop this historic German initiative. We do not wish to take any action that would perpetuate present or future cases. Indeed, it will be the enduring and high interest of the United States to support efforts to achieve dismissal of all World War II-era cases, and the United States will act accordingly. To do otherwise would threaten the very Foundation Initiative to which all of us, including the President and the Chancellor, have devoted so much time and effort.[17]

Despite the express wishes of the White House, California seeks to enforce a law that threatens the Foundation Initiative. By upholding the HVIRA, the Ninth Circuit has permitted California to interfere with U.S. foreign policy and effectively regulate foreign commerce. Such activity adversely affects the sovereign interests of the Federal Republic and the United States.

Left uncorrected, the Ninth Circuit's decisions will serve to invite other states to substitute their own foreign policy objectives for those of the United States, opening the door to intrusive and potentially inconsistent regulation of insurance companies in Germany by 50 separate states. At least six states in addition to California (Florida,[18] Maryland, Minnesota, New York, Texas, and Washington) have enacted legislation—and at least four other states (Illinois, Massachusetts, New Jersey, and Rhode Island) introduced legislation to regulate (in potentially inconsistent ways) foreign insurance companies that issued policies in Europe

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[17] Letter from Samuel R. Berger, Assistant to the President for National Security Affairs, and Beth Nolan, Counsel to the President, to Michael Steiner, National Security Assistant to the Chancellor, dated June 16, 2000, *available at* http://www.state.gov/www/regions/eur/holocaust /000616_letter.pdf.

[18] The Eleventh Circuit struck down substantially identical legislation enacted in Florida. *See Gerling Global Reinsurance Corp. v. Gallagher*, 267 F.3d 1228 (11th Cir. 2001).

over 55 years ago. Several of these states took legislative action soon after the Ninth Circuit's first decision in this case. Like the HVIRA, such legislation jeopardizes U.S.-German foreign relations.

III. The HVIRA Creates Tension In U.S.-German Relations.

California's HVIRA impairs the ability of the Federal Republic to maintain productive relations with the United States. It frustrates the United States' ability to speak with one voice on matters of foreign affairs and foreign commerce. The Federal Republic, the United States, and other sovereign nations reached an international consensus on the basis of diplomatic, economic, and other foreign policy factors—factors which California has no capacity to weigh and no motivation to consider. As the present dispute illustrates, California has independent policy interests that do not coincide with those of the United States, let alone the Federal Republic and other sovereign nations.

By undermining the U.S.-German Executive Agreement and German legislation enacted in accordance with that agreement, the HVIRA offends German and U.S. sovereignty. California's law is particularly offensive to Germany in light of the law's clear implication that the Federal Republic is either incapable or unwilling to achieve the proper resolution of unpaid Holocaust-era insurance claims. Such an implication contrasts starkly with reality. The Federal Republic has long accepted responsibility for the sovereign task of compensating victims of the Holocaust, that responsibility has been recognized by the United States and the entire international community, and Germany's efforts have been commended by the United Nations.

The Ninth Circuit's decisions, like the HVIRA, demonstrate equal disregard for the sovereign authority of nations to settle post-war restitution and compensation issues through the conduct of international diplomacy, as opposed to extraterritorial regulation and local litigation. The

decisions failed even to acknowledge, let alone discuss, the sovereign positions of the Federal Republic and the United States, notwithstanding the fact that the two governments have clearly articulated foreign policy interests in the matter.

The puzzling assertions in the panel's first decision that (a) "there is no evidence that HVIRA would be applied in a way that would implicate the diplomatic concerns mentioned in *Zschernig*,"[19] and (b) "HVIRA and the executive branch initiatives [including the U.S.-German Executive Agreement] share the same policy objective, although they seek to achieve that policy objective by varying techniques"[20] are erroneous. It defies logic to conclude that a policy of the United States Government expressly recognizing that it is in the United States' foreign policy interests for the German Foundation to be the *exclusive remedy and forum* and seeking to end all litigation in United States courts of National Socialist era claims shares the same objective as a California regulatory statute that seeks to force publication of information to set up the California state courts as a second forum for contentious litigation of the same claims. Nor is it rational to conclude that the California statute does not implicate United States Government diplomatic concerns that mirror those of the Federal Republic. As the amicus brief of the United States clearly stated, "the premise of the California legislation is in direct conflict with that of United States foreign policy."[21] The same holds true for the Federal Republic of Germany.

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[19] *Gerling Global Reinsurance Corp. of America v. Low*, 240 F.3d 739, 753 (9th Cir. 2001) (citing *Zschernig v. Miller*, 389 U.S. 429 (1968)).

[20] *Id.* at 750.

[21] Brief for Amicus Curiae the United States of America in Support of Rehearing *En Banc* (filed Aug. 5, 2002) (ER 1255-77).

CONCLUSION

For the reasons set forth above, the Federal Republic of Germany respectfully urges the Court to reverse the decisions of the Ninth Circuit and to declare the HVIRA unconstitutional.

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